Filed 6/14/19 In re K.G. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re K.G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. K.G., Defendant and Appellant.	A155146 (Contra Costa County Super. Ct. No. J1800587)

K.G. (Minor) appeals dispositional orders of the juvenile court entered after he admitted to a misdemeanor second degree burglary count. He challenges one condition of his probation as vague, while arguing another condition improperly delegates authority to the probation department and is overbroad. Last, he contends the juvenile court improperly imposed a restitution fine without determining whether he had the present ability to pay it. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

A juvenile wardship petition (Welf. & Inst. Code,[1] section 602, subd. (a)) was filed in Alameda County alleging that Minor committed felony second degree burglary of a vehicle (Pen. Code, § 459, count 1), misdemeanor possession of burglar's tools (*id.*, § 466, count 2), and misdemeanor giving false information to a peace officer (*id.*, § 148.9, subd. (a), count 3). Minor admitted a single misdemeanor second degree burglary count, and the remaining counts of the petition were dismissed. Probation reports showed Minor burglarized a vehicle in a parking garage at a recreational facility at U.C. Berkeley; he misidentified himself when contacted by the police; and upon being searched, police found he had a tool for breaking windows hanging around his neck and headphones taken from the burglarized car in his backpack. After the court sustained the petition, it transferred the matter to Contra Costa County, the county of Minor's residence, for a disposition hearing.

The juvenile court in Contra Costa County held a disposition hearing, at which it considered the probation department's disposition report. The disposition report discussed Minor's need for counseling to address his separation from his parents and his placement with his grandmother. The report indicated that Minor and his grandmother thought counseling for him would be helpful or beneficial. At the disposition hearing, the juvenile court and the parties discussed the fact that Minor would be engaged in an independent study program with a flexible schedule during the school year. Counsel for Minor stated the program was one where Minor would work on packets and turn them in to a teacher as often as he completed them. The court expressed concern that Minor needed a more structured school program, and counsel for Minor asserted they were looking into a different program.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

Ultimately, the juvenile court adjudged Minor a ward without a termination date and placed him on probation. As relevant here, the court imposed various probation conditions, including that he: attend school regularly, meaning "every single day on time," and obey all school rules; attend all counseling as directed by his probation officer; and pay a $25.00 restitution fine.

DISCUSSION

A. Challenge to Condition that Minor Attend School Regularly

Minor's first contention is that the probation condition that he attend school regularly is unconstitutionally vague because he was not going to physically attend a traditional school, but rather participate in an independent study program where he would complete his work from home. As such, he claims, the condition is not sufficiently precise to notify him what he is required to do and it also leaves the probation officer with unfettered authority to decide whether he is attending school regularly. He asks to have the condition stricken or modified to require that he complete his school work as directed by his independent studies program.

"As a general rule, failure to challenge a probation condition on constitutional . . . grounds in the trial court waives the claim on appeal." (*In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.) Here, we find the issue forfeited because, as Minor concedes, his attorney did not object when the juvenile court imposed the condition. Minor urges us to review the issue, arguing his attorney rendered ineffective assistance by not objecting below. This is unpersuasive.

There are two elements for demonstrating ineffective assistance of counsel: first, defense counsel's performance was objectively deficient, and second, prejudice ensued from that deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Generally, "where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal

unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

In this case, the record is silent as to why Minor's counsel did not object to the condition at the disposition hearing. On this record, we cannot say there was no conceivable reason for counsel's failure to object. Counsel may have tactically decided it was not in her client's best interest to object to this particular condition, or might have had reason to believe such an objection would not succeed. As Minor acknowledges on appeal, in *In re D.H.* (2016) 4 Cal.App.5th 722 (*D.H.*), the court upheld a vagueness challenge to an identical probation condition. (*D.H.*, at p. 730.) The *D.H.* court explained that while the "command to attend 'regularly' is arguably vague in a vacuum," viewed in context and alongside the command that the minor obey school rules, the condition was sufficiently precise and did not require modification. (*Ibid.*)

Here, as in *D.H.*, Minor was ordered to obey all school rules. Minor argues that *D.H.* is distinguishable and that the condition requiring his obedience to all school rules does not make the condition sufficiently precise because "presumably, the school [in *D.H.*] had rules on daily attendance and would require a student to be in class all day absent a valid excuse. [Citation.] In contrast here, the school is not set up in a manner where [Minor] would attend any classes or need an excused absence; the schedule is flexible and [Minor] does all of his work at home." Minor further asserts "there is no indication that the obey-school-rules condition would clarify the attend-school-regularly condition because the school itself does not have any physical location where [Minor] attends."

This argument, however, assumes because Minor's independent study program allows him to do work from home, it does not have any rules regarding attendance that would render the condition at issue sufficiently precise. But nothing in the record clearly supports this. Because the details of Minor's independent study program rule are not reflected in the record, we cannot determine if the condition that Minor attend school

regularly—understood in context and particularly in light of the condition that he obey all school rules—is insufficiently precise and not susceptible to any reasonable and practical construction. (*People v. Rhinehart* (2018) 20 Cal.App.5th 1123, 1129 ["Probation terms must be 'given "the meaning[s] that would appear to a reasonable, objective reader" ' [citation], and interpreted in context and with the use of common sense [citation]. A probation condition 'should not be invalidated as unconstitutionally vague " ' "if any reasonable and practical construction can be given to its language" ' " or if its terms may be made reasonably certain by reference to ' " 'other definable sources' " ' "].)

Ultimately, Minor has not carried the heavy burden of demonstrating his attorney performed deficiently. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260 [on an appellate claim of ineffective assistance, counsel's competency is *presumed* unless the record *affirmatively* excludes a rational basis for counsel's choice].)

B. Challenge to Condition that Minor Attend All Counseling

Minor challenges the condition that he attend all counseling as directed by his probation officer. He first contends the condition improperly delegates authority to probation to choose the type of counseling he must participate in. He asks us to either strike the condition or remand the matter to the juvenile court to specify the type of counseling required.

Minor concedes he did not object to this condition below. He argues, however, that his claim of improper delegation has not been forfeited. Assuming the issue has been preserved on appeal, it fails on the merits.

A juvenile court has broad discretion to establish probation conditions. (*D.H.*, *supra*, 4 Cal.App.5th at p. 727.) "[A juvenile] court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (§ 730, subd. (b).) That said, juvenile courts may not delegate the exercise of their discretion to probation officers. (*In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1372 (*Pedro Q.*).)

Here, the court imposed the condition that Minor participate in counseling; it did not delegate that decision to probation. Nonetheless, Minor complains the condition should have narrowed probation's authority by specifying the type and frequency of counseling he should attend. *People v. Penoli* (1996) 46 Cal.App.4th 298 (*Penoli*), however, supports the order here. In *Penoli*, the defendant made a similar challenge to a probation condition that required her to enter a residential drug treatment program " 'as approved by the Probation Officer' " and to remain there until she successfully completed it. (*Penoli*, at p. 301.) The court rejected the argument that the condition unlawfully delegated judicial authority to probation to unilaterally select a drug rehabilitation program, reasoning that "any attempt to specify a particular program at or prior to sentencing would pose serious practical difficulties. The trial court is poorly equipped to micromanage selection of a program, both because it lacks the ability to remain apprised of currently available programs and, more fundamentally, because entry into a particular program may depend on mercurial questions of timing and availability." (*Id.* at p. 308.)

Minor tries to distinguish *Penoli* on the ground that the subject order identified the *type* of program that the probationer was supposed to attend (residential drug treatment), while the order here gives the probation officer unlimited discretion to order his participation in different types of counseling. This is unpersuasive. Although the order in *Penoli* was arguably more specific than the order here because it required the defendant's participation in a "residential drug treatment program," it similarly lacked details such as the type of drug treatment and its location and frequency. Ultimately, we decline to hold, on this record, that the delegation of authority to probation to select an appropriate counseling program was erroneous. The juvenile court here could properly empower the probation department to select a counseling program for Minor because, as in *Penoli*, a court may not be as well equipped to micromanage the selection of such programs. Notably, "[a] probation condition should be given 'the meaning that would appear to a reasonable, objective reader' " and we will not presume a probation officer

will issue irrational or capricious directives. (*People v. Olguin* (2008) 45 Cal.4th 375, 382–383; *People v. Stapleton* (2017) 9 Cal.App.5th 989, 996.) Here, Minor can seek judicial intervention if and when the probation officer seeks to exercise the delegated authority in a manner that Minor believes is inappropriate. (§ 778, subd. (a).) We decline to hold this is an insufficient remedy. (*Penoli*, *supra*, 46 Cal.App.4th at p. 308.)

Minor's authorities addressing improper delegation are inapposite. This is not a case where a probation officer imposed a new probation condition that the juvenile court had never ordered or even considered. (*Pedro Q.*, *supra*, 209 Cal.App.3d at pp. 1371–1373 [finding improper delegation where probation imposed a term restricting travel never considered by the trial court].) Likewise, this is not a case where the challenged delegation of authority to the probation department runs afoul of a statutory scheme. (*In re Debra A.* (1975) 48 Cal.App.3d 327, 328–330 [statute provided for commitment to a specific juvenile home, ranch, camp, or forestry camp, not commitment to all of them at the choice of probation]; *People v. Cervantes* (1984) 154 Cal.App.3d 353, 356–358 [unlimited delegation to the probation officer to determine the amount and manner of restitution improper because unauthorized by statute]; *In re Joshua R.* (1992) 6 Cal.App.4th 1252, 1253–1254 ["[T]he court may not simply delegate the determination of the amount [of restitution] to the probation officer"].) We thus reject the contention that the delegation of authority to oversee selection of an appropriate counseling program for Minor was erroneous.

Finally, Minor also contends this particular probation condition is unconstitutionally overbroad because it does not specify the type and frequency with which he must attend counseling, leaving the door open for his probation officer to make him attend counseling of a type or with a frequency that is untethered to his case or needs. Again, Minor did not object to this condition on this ground below, and we do not agree with Minor's contention that the forfeiture rule is inapplicable. This is not a situation where the challenged probation condition is properly characterized as "facially

overbroad," and "easily remediable on appeal." (*In re Sheena K.* (2007) 40 Cal.4th 875, 888 [finding probationer's forfeiture properly disregarded where facially vague and overbroad probation condition could be corrected by inserting a knowledge requirement].) Rather, the alleged error here can be corrected only by reference to the sentencing record, which is necessary to further tailor the condition. As such, we find the overbreadth claim has been forfeited. (*Id.* at p. 889.)

C. Challenge to the Restitution Fine

At the disposition hearing, the trial court imposed a $25.00 restitution fine. In supplemental briefing citing to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Minor challenges the *imposition* of the restitution fine on due process grounds, arguing the juvenile court did not find he had a present ability to pay it. He asks us to stay execution of the fine unless and until the People can show he has the present ability to pay it.

The People argue Minor forfeited this issue on appeal because he failed to raise it in the juvenile court. Minor concedes his attorney failed to timely object, but argues he has not forfeited the issue because the juvenile court could not legally impose the fine without first determining his ability to pay. Minor also contends any objection would have been futile because governing law on the restitution fine offered scant grounds for objecting to it and because *Dueñas* represents a dramatic and unforeseen change in the law governing assessments and restitution fines.

We conclude Minor forfeited review of the issue. While section 730.6 requires imposition of a restitution fine regardless of a minor's ability to pay (§ 730.6, subds. (a)(2)(A), (b), (c)), the statute explicitly states that "[i]n setting the amount of the fine . . . the court shall consider any relevant factors including, but not limited to, the minor's ability to pay." (*Id.*, subd. (d)(1).) Section 730.6 also explicitly states that "[t]he consideration of a minor's ability to pay may include his or her future earning capacity" and that "[a] minor shall bear the burden of demonstrating a lack of his or her ability to

pay." (*Id.*, subd. (d)(2).) Here, Minor did not object to the restitution fine on any ground, and he certainly could have objected and made an appropriate record had his ability to pay actually been a concern. In light of the statute, which expressly authorizes consideration of a minor's ability to pay and places the burden on the minor to demonstrate an inability to pay, Minor's failure to raise the issue below warrants application of the forfeiture rule.[2] (See, e.g., *People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Avila* (2009) 46 Cal.4th 680, 729.)

In any event, even if we were to excuse Minor's forfeiture, we would reject his claim. (See, e.g., *People v. Nelson*, *supra*, 51 Cal.4th at p. 227.) This case presents no parallel to the unique factual circumstances presented in *Dueñas*, which involved a defendant who made a showing that she was chronically indigent and suffering from cerebral palsy, was a mother of two young children, was largely unemployed and receiving public assistance, had limited education, and had been unable to pay prior citations and fees. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1160–1163.) Here, there is nothing in the record demonstrating or otherwise indicating Minor's inability to pay a $25.00 restitution fine. To the contrary, the probation report and record of the disposition hearing reflect that Minor is young, employed, receiving an education, and, as of date of

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[2] In reaching this conclusion, we note that in *Dueñas*, forfeiture was not an issue because the defendant had twice requested a hearing to determine her ability to pay, then at the requested hearing, objected and presented evidence that she could not pay the restitution fine. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1162–1163.) And *Dueñas*, which Minor relies on, does not stand for the proposition that a restitution fine cannot legally be *imposed* without a determination of his ability to pay. (*Dueñas*, at p. 1172 ["although the trial court is *required* by Penal Code section 1202.4 *to impose* a restitution fine, the court *must stay the execution* of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine"], italics added.)

In any case, the language of section 730.6 compels rejection of Minor's argument that it would have been futile to raise the issue. Had Minor raised the issue, the court could have considered his ability to pay and, if warranted, set the fine as low as one cent. (§ 730.6, subd. (b)(2) ["If the minor is found to be a person described in Section 602 by reason of the commission of one or more misdemeanor offenses, the restitution fine shall not exceed one hundred dollars ($100)"].)

disposition, living with his grandmother. As it stands, the record offers no reason to doubt that Minor has, or will have, the ability to pay the $25.00 fine. (§ 730.6, subd. (d)(2) ["The consideration of a minor's ability to pay may include his or her future earning capacity"].)

DISPOSITION

The judgment is affirmed.

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Fujisaki, Acting P. J.

WE CONCUR:

_____
Petrou, J.

_____
Wiseman, J.*

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.